
COURT OF APPEAL—3RD AND 4TH OCTOBER, 1957

HOUSE OF LORDS—3RD, 4TH AND 5TH NOVEMBER, AND
18TH DECEMBER, 1958

Commissioners of Inland Revenue

v.

Wood Bros. (Birkenhead), Ltd. (in liquidation)⁽¹⁾

Surtax—Undistributed income of trading company—Computation of actual income—Balancing charge—Income Tax Act, 1952 (15 & 16 Geo. VI & 1 Eliz. III, c. 10), Sections 245, 248, 255 (3), 292, 301 (1) and 323 (4).

The amount assessed to Income Tax by way of a balancing charge on the excess of the sale price of machinery and plant over the Respondent Company's unallowed capital expenditure on the provision thereof was included in the Company's actual income for the period ending 16th April, 1952 (the commencement of the winding-up), apportioned for Surtax purposes among the members under Sections 245 and 248, Income Tax Act, 1952. On appeal the Special Commissioners held that the amount of the balancing charge did not fall to be included in the actual income of the Company.

Held, that the Commissioners' decision was correct.

CASE

Stated under the Income Tax Act, 1952, Sections 247 (1), 248 (3) and 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

I. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 12th June, 1956, Wood Bros. (Birkenhead), Ltd. (in liquidation), hereinafter called "the Respondent", appealed against a direction and apportionment made by the Special Commissioners of Income Tax dated 11th March, 1955, in pursuance of powers conferred on them by Sections 245 and 248, Income Tax Act, 1952, directing that the actual income of the Respondent from all sources, as computed for the purposes of Chapter III of Part IX of the Income Tax Act, 1952, for the period 30th April, 1950, to 16th April, 1952, inclusive, should be apportioned among its members. The actual income of the Respondent, so computed by the Special Commissioners of Income Tax, amounted to £76,264, and the apportionments were as follows :

⁽¹⁾ Reported (Ch. D.) [1958] Ch. 476; [1957] 3 W.L.R. 713; [1957] 3 All E.R. 147; 224 L.T. Jo. 118; (C.A.) [1958] Ch. 476; [1957] 3 W.L.R. 713; 101 S.J. 849; [1957] 3 All E.R. 314; 224 L.T. Jo. 251; (Appeal Committee) [1958] 1 W.L.R. 64; 102 S.J. 52; [1958] 1 All E.R. 405; (H.L.) [1959] 2 W.L.R. 47; 103 S.J. 54; [1959] 1 All E.R. 53; 227 L.T. Jo. 23.

| | £ | s. | d. |
|-----------------------------------|--------|----|------|
| To preference shareholders | 9,732 | 0 | 0 |
| To ordinary shareholders | | | |
| A. E. Wood | 22,168 | 9 | 0 |
| E. le V. Wood | 22,168 | 9 | 0 |
| S. le V. Wood | 22,168 | 10 | 0 |
| E. Randle | | 26 | 12 0 |

The grounds of the appeal were that the amount of the actual income of the Respondent so computed by the Special Commissioners of Income Tax was excessive inasmuch as it included £18,675 in respect of a balancing charge as hereinafter appeareth.

II. The following documents were produced and admitted at the hearing of the appeal:

- (1) Trading and profit and loss account and profit and loss appropriation account for the year ended 28th April, 1951, and balance sheet of that date.
- (2) Profit and loss account and profit and loss appropriation account for the period 29th April, 1951, to 16th April, 1952, and balance sheet at that date.
- (3) Direction and apportionment by the Special Commissioners of Income Tax dated 11th March, 1955.

The above documents are not attached and do not form part of this Case but are available for the use of the High Court if required.

III. We found the following facts admitted or proved on evidence adduced at the hearing of the appeal:

(1) The Respondent was formerly known as Woodson Stores, Ltd., and had an issued capital of £65,000 and carried on a wholesale grocery business. It sold its business and ceased trading on 28th April, 1951, and on 25th April, 1951, it changed its name to that by which it was known at present. On 16th April, 1952, the Respondent went into voluntary liquidation.

(2) It was common ground between the parties that a balancing charge fell to be made on the Respondent in respect of sales of plant and machinery, on cessation of its business, under the provisions of Section 292 (1) and Section 323 (4), Income Tax Act, 1952, which was correctly computed at £18,675.

(3) The accounts of the Respondent for the year ended 28th April, 1951, and the period 29th April, 1951, to 16th April, 1952, were not certified by the auditors, Alfred G. Deacon & Co., chartered accountants, 395 Corn Exchange Buildings, 27 Fennel Street, Manchester 4, until 7th May, 1952. It was common ground between the parties that the whole of the period from 29th April, 1950, to 16th April, 1952, inclusive, was the period from the end of the last year for which accounts of the Respondent had been made up to the time of the commencement of the winding-up, within the meaning and for the purposes of Section 253, Income Tax Act, 1952.

(4) It was also common ground between the parties that the actual income of the Respondent from all sources, as computed for the purposes of Chapter III of Part IX of the Income Tax Act, 1952, for the said period, fell to be apportioned among its members under the provisions of Sections 245 and 248, Income Tax Act, 1952. Excluding the balancing charge of £18,675, this amounted to £57,589.

IV. It was contended by the Respondent:

- (1) that the amount which fell to be apportioned among its members under the provisions of Sections 245 and 248, Income Tax Act, 1952, was its actual income from all sources for the period 30th April, 1950, to 16th April, 1952;
- (2) that the amount of the assessment on the Respondent in respect of the balancing charge of £18,675 as aforesaid did not fall to be included in the actual income of the Respondent for the purposes of the said Sections 245 and 248, Income Tax Act, 1952;
- (3) that the appeal should be allowed and that the direction and apportionment of the Special Commissioners should be amended by reducing the amount of the actual income of the Respondent included therein for apportionment to £57,589, and the amounts apportioned to its members in proportion thereto.

V. It was contended on behalf of the Appellants:

- (1) that the amount which fell to be apportioned among the members of the Respondent under the provisions of Sections 245 and 248, Income Tax Act, 1952, was the actual income from all sources for the period 30th April, 1950, to 16th April, 1952, inclusive, which amounted to £76,264;
- (2) that the amount of the balancing charge of £18,675 assessed on the Respondent was correctly included in the computation for the purpose of arriving at the actual income from all sources within the meaning of Chapter III of Part IX of the Income Tax Act, 1952;
- (3) that the appeal should be dismissed and the direction and apportionment amongst the members of the Respondent be confirmed.

VI. We, the Commissioners who heard the appeal, upon consideration of the evidence adduced and the arguments addressed to us on behalf of the parties, decided that the amount of the balancing charge assessed upon the Respondent under the provisions of Sections 292 and 323 (4), Income Tax Act, 1952, did not fall to be included in the actual income of the Respondent from all sources for the purposes of Chapter III of Part IX of the Income Tax Act, 1952. Accordingly, we allowed the appeal and amended the said direction of the Special Commissioners of Income Tax, dated 11th March, 1955, by reducing the amount of the actual income of the Respondent to be apportioned among its members from £76,264 to £57,589. We adjourned the appeal for agreement of figures between the parties on the basis of this our decision in principle. On 28th August, 1956, the figures having been agreed between the parties, we determined the appeal by reducing the amounts apportioned to the members of the Respondent as follows:

| | £ | s. | d. |
|----------------------------------|--------|----|----|
| To preference shareholders... .. | 9,732 | 0 | 0 |
| To ordinary shareholders: | | | |
| A. E. Wood | 15,945 | 19 | 0 |
| E. le V. Wood | 15,945 | 19 | 0 |
| S. le V. Wood | 15,945 | 19 | 0 |
| E. Randle | 19 | 3 | 0 |
| | 57,589 | 0 | 0 |

VII. The Appellants immediately after the communication to them of our determination of the appeal expressed to us their dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1952, Sections 247 (1), 248 (3) and 64, which Case we have stated and do sign accordingly.

VIII. The point of law for the opinion of the High Court is whether on the facts found by us there was evidence upon which we could properly arrive at our decision and whether on the facts so found our determination of the appeal was correct in law.

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|------------|---|---|
| F. Gilbert | } | Commissioners for the Special Purposes of the Income Tax Acts. |
| N. Rowe | | |

Turnstile House,
94-99, High Holborn,
London, W.C.1.
23rd April, 1957.

The case came before Harman, J., in the Chancery Division on 15th and 16th July, 1957, when judgment was given against the Crown, with costs.

Mr. John Senter, Q.C., and Mr. Alan Orr appeared as Counsel for the Crown, and Mr. Philip Shelbourne for the Company.

Harman, J.—This case raises a complicated point, and but for the date I should have wished to consider my judgment; but I have formed a view, and therefore, though no doubt in halting words, I propose to give voice to it.

This was a company to which Section 245 of the Income Tax Act, 1952, applies. That repeats Section 21 of the Finance Act, 1922, which imposed Surtax on the undistributed income of certain companies, of which this was one. The question between the parties is whether, for the purpose of calculating what I may call the Surtax income of the Respondent Company, a balancing charge of some £19,000 ought to be treated as part of the Company's actual income. The Crown says it should, and therefore should be treated as part of that income for apportionment among the members of the Company in order that they may be surtaxable on it. The Company says it should not, and with that view the Special Commissioners agreed. They do not give any reasons: I envy them, but must give reasons for what I decide.

The facts are extremely small in compass and plain. The Company ceased trading in 1951 and sold its plant and machinery. It went into liquidation on 16th April, 1952. At that time no accounts had been made up within the meaning of the Income Tax Acts since 30th April, 1950. Therefore, the period over which the Company had to be taxed was the period from 30th April, 1950, to 16th April, 1952.

This Company having gone into liquidation, it follows from Section 253 that the income of the Company over the relevant period, which in this case, as I say, dated from April, 1950, is to be deemed to be income of that period available for distribution to the members of the Company, so

(Harman, J.)

that the Special Commissioners have not got to consider, as I understand it, whether a reasonable amount or no has been distributed. That goes without saying in the case of a company which has gone into liquidation. Nevertheless, it is in the position of a company that has not distributed a reasonable part of its actual income from all sources for the period, and the controversy is what was the actual income of the Company for the period in question. That has been agreed, excepting for this matter of the balancing charge which was levied on the Company. In order that the balancing charge should be part of the income of the members it must be part of the actual income from all sources for the period of the Company, and therefore the matter to be considered, and I think the only matter, in this case is what is the nature of a balancing charge.

A balancing charge was first imposed by the Income Tax Act of 1945 and was subsequently embodied in the codifying Act of 1952 by Section 292, and at the relevant period that Section had not been altered, as it was very soon to be altered, by the Finance Act of the same year; and therefore one must look at the Act as it was before it was altered. Section 292 provides that, where any machinery and plant in respect of which various allowances have been made is sold, a balancing charge or a balancing allowance shall arise. A balancing allowance is something allowed to the company where it turns out that the annual allowances and the initial allowance have not proved enough to equate the written-down value for Income Tax purposes of the plant in question with the proceeds of sale. There is an allowance to the taxpayer if he proves to be out of pocket; on the other hand, there is a charge against him if he proves not to be, and that is the balancing charge in this case.

The machinery and plant was sold and produced an excess of some £19,000, and at first sight it seems a most extraordinary thing that it should be suggested that what is a charge upon the Company—that is to say, a subject-matter on which tax is to be levied—should in some way be the actual income of the Company. It is a notion which to me—I must say, virgin soil in respect of these balancing charges—struck an incongruous note. I found it hard to see how it could be that that which was a liability on the Company could yet be part of its income. But in Income Tax cases the common sense of the matter has got so overlaid by Statute and the ingenuity of Counsel and the subtleties of the law generally that things are rarely quite what they seem. When one looks at the Statute, one finds that Part X of the Act of 1952 deals with reliefs for capital expenditure; it follows that the expenditure in respect of which the reliefs are given was capital expenditure. You start, therefore, with this, that the Company spent capital on plant and machinery. It received under this Part X an initial allowance and annual allowances against the capital expenditure, and those were allowed against the income of the Company year by year. It is said, therefore, and this is true, that a corresponding part of the Company's profits for that reason did not pay the tax which would otherwise have been levied upon them.

When the sale produces an excess, the balancing charge is levied under Section 292, and Section 292 (3) says this:

“If the sale . . . moneys exceed the amount, if any, of the said expenditure still unallowed as at the time of the event, a balancing charge shall be made, and the amount on which it is made shall be an amount equal to the excess”.

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Sub-section (4) puts a ceiling on that whereby the amount on which a balancing charge is made cannot exceed the amount of the initial allowance plus the amount of the annual allowances in respect of the machinery or plant in question. The charge is made as provided in Section 301, which provides that

“Any . . . charge made . . . on any person under the preceding provisions of this Chapter shall . . . be made . . . on that person in charging the profits or gains of his trade.”

In other words, if you get a charge made on you, tax on it is charged together with tax on the profits of your trade. If you get an allowance made to you, that is allowed by deducting it from the profits or gains of your trade. The method of charging the tax is regulated by Section 323 (4):

“Any charge falling to be made under any of the provisions of this Part of this Act on a person for any year of assessment in charging the profits or gains of his trade”

—that links in with Section 301—

“shall be made by means of an assessment on the profits or gains of that trade for that year of assessment in addition to any other assessment falling to be made thereon for that year.”

As a result of the assessment there is a figure on which, together with the other assessment for the year, tax is chargeable under Section 323; but the fact that tax is chargeable in that way does not, as it seems to me, convert part of the moneys received by the Company from the sale of a capital asset into the Company's income. The Company did not have that sum in its coffers as income at any time. It received a certain sum of money for that machinery and plant; that was capital in the Company's hands. If it was above the cost of the plant the excess might be the subject-matter of a capital profit available for dividend. But to say that so much as is liable to a charge in favour of the Crown because excessive allowances have been made becomes thereby income, that, says the Respondent, is something which has no warrant in the Act at all; there is nothing to convert capital into income.

The Crown's argument, as I understand it, is this. This is in fact a recoupment to the Crown of money allowed to the subject in excess of what should have been allowed. Those allowances were made by way of revenue concessions. The result of them was that the Company kept in its coffers profits which would otherwise have been subject to tax. Therefore, when the Company comes into possession of the excess, the effect is to bring back into the balance sheet for tax purposes those profits which had been franked by the allowances for the earlier years. Therefore you should look at it as if these profits were brought back, the frank being removed by the act of sale, and therefore they are profits chargeable to tax and are *quasi* profits or gains of the Company when truly looked at.

That is a way of explaining what would otherwise be, to me, inexplicable, and it has an air of attractiveness about it; but it seems to me altogether to leave out the key word, which is the word “actual”. The Company never had this income in its coffers. It had some proceeds of sale. It never had any actual income, as I see it. Suppose this had been a case where it was for the Commissioners to ascertain under Section 245 whether there had been a distribution in the year of a reasonable part of the actual income of the Company. It is inconceivable that the Commissioners should or could have taken this balancing charge into account, because no part of it was ever a distributable part of the Company's income.

(Harman, J.)

It was never in fact part of the Company's income at all, and therefore no part of its actual income. It might under certain circumstances be treated or deemed as being the Company's income, but that is not what the Act is talking about; it is talking about actual income, and not a fictitious or supposed income. Lord Uthwatt, in *Lord Howard de Walden v. Commissioners of Inland Revenue*, 30 T.C. 345, seems to me to have given voice to that very matter. I need not trouble about the subject-matter of that case; it is very far from anything I have to decide here. At page 370, Lord Uthwatt says this, dealing with what is now Section 245:

"Thirdly, the direction to the Commissioners is to decide at the outset whether a reasonable part of the actual income of a particular company has been distributed. It would be more than curious if in that task they were to direct their minds to an arithmetical total composed of income which is capable of distribution and of 'deemed income' (such deemed income being merely a figure—not even a book entry) which is incapable of distribution. In a case where company No. 2 owned nothing but shares in company No. 1, the arithmetical total to be considered might well be only 'deemed income'. My Lords, for myself I am content to take the view that, in light of the context, the words 'actual income' can mean only income which is in some real sense capable of distribution. Apart from that context, indeed, the phrase 'actual income' is hardly apt to include fictional income; and non-existent income composed of amounts deemed to be income is fictional income."

I think this is a stronger matter than that. There was a book entry here of a receipt. There was no receipt in any income sense at all. These were receipts of proceeds of sale of this machinery on a part of which this tax was levied, the part on which it was levied being charged. I do not think myself that the tax charged was Income Tax, although it was levied by an assessment and dealt with on Income Tax principles as if it were part of the profits or gains of the Company. Therefore it seems to me, although it sounds a simple-minded way of putting it, that if you have answered the question, was this actual income, and you have found it was only income, if at all, in an extremely rarefied and fictional sense, you have really answered the only question in this case.

There is some authority about it in *Townsend v. Electrical Yarns, Ltd.*, 33 T.C. 166, a case of my brother Donovan's—and, of course, his decisions in this sort of matter carry a great deal of weight—where he was deciding something just the opposite to this, because there the taxpayer, for purposes of his own, was wishing to say that the balancing charge which had been made upon him ought to be added to his taxable profits in order to bring them above a certain figure and so deprive the Crown of an option which it would otherwise have. Donovan, J., said this, at page 168:

"In other words, the effect of the balancing charge is to cancel allowances previously given for capital loss through wear and tear, where that loss is recouped by the taxpayer on a sale of his machinery",

and that is a very good and succinct description of what a balancing charge is. Then he deals with the awkward Section which I have read, and the words

"by means of an assessment on the profits or gains of that trade".

He said (at page 170):

"Do these words require that the balancing charge must be levied as the Company contends?"

It will be remembered that the company contended that the charge should be treated as part of their annual profits or gains.

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"If so, it would seem also to follow that in a year for which a balancing charge has to be made, but in which there are no profits or gains of the trade to be taxed, no balancing charge can be made at all. Or, on the contrary, do the words merely define the kind of assessment by which the balancing charge is to be levied? In considering this problem it has to be remembered that the balancing charge falls to be made because by the sale of his plant and machinery the taxpayer has recouped the capital loss in respect of which he was previously given a wear and tear allowance. That is the whole purpose of the balancing charge and there is therefore no reason whatever why the effective levy of the charge should depend upon whether there are profits or gains of the trade, or, as in this case, upon the amount of them."

Then, going on to page 171, he says :

"... bearing in mind that the purpose of Section 17 and Section 55 "

—those are the original Sections of the 1945 Act—

"is clearly to levy a balancing charge on £600, I am faced with the problem whether the words in Section 55, 'by means of an assessment on the profits or gains of the trade' mean literally that there must be an assessment on such profits; that is, do they describe what the result of the assessment is to be, or are they descriptive merely of the kind of assessment the Legislature had in mind? I think the latter is the true interpretation."

And so do I. I do not quite share the learned Judge's views which he thereafter expresses as to how he arrived at that, but it seems to me, because you say it is to be levied on the profits or gains of his trade, that does not make the balancing charge part of those profits or gains. It clearly is not the profits or gains of the trade, and there, really, is an end of it.

But if there were doubt in the matter, I think perhaps a passage in the speech of Lord Reid in *Kirkness v. John Hudson & Co., Ltd*(¹), [1955] A.C. 696, at page 729, would resolve it. The question there was whether there had been a sale within the meaning of a certain Section. He said:

"I find nothing in the Income Tax Act, 1945, to justify giving to the word 'sale' a meaning wider than its ordinary meaning. In a taxing Act, and particularly in a charging section, one assumes that language is used accurately unless the contrary clearly appears, and, in my opinion, section 17 is a charging section. It is the only section which could authorise the assessment in this case. It is true that its provisions may sometimes favour the taxpayer by entitling him to a balancing allowance. But that does not prevent it from being a charging section as regards those whom it makes liable to pay tax, and 'no tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him' (per Lord Blackburn in *Coltress Iron Co., Ltd. v. Black*(²))."

Now, it seems to me that this Section 292, to which Lord Reid was there referring, so far as it did lay a burden on the taxpayer, is a charging Section and must be construed, as they say, strictly. I am not sure that I have ever understood what the words "construed strictly" mean. One construes the words. It does mean this, I suppose, that if you are in doubt, the taxpayer is entitled to the benefit of the doubt; but after all the words I have to construe are the two words "actual income". You might ask 100,000 people whether a balancing charge levied on the Company was its actual income, and every one of them would say, No, because it is not income at all. It is a charge, and a charge can only become income in the extremely ingenious arguments of Mr. Senter, to whom I am much indebted; but I do not feel I ought to accept anything so refined and put on the taxpayer a liability to which otherwise he could not be liable.

(¹) 36 T.C. 28, at p. 75.

(²) 6 App. Cas. 315, at p. 330; 1 T.C. 287, at p. 316.

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My judgment is that the Special Commissioners came to a totally right conclusion, and I propose to dismiss the appeal.

Mr. Philip Shelbourne.—Will your Lordship say, with costs?

Harman, J.—Yes.

The Crown having appealed against the above decision, the case came before the Court of Appeal (Jenkins, Parker and Pearce, L.J.J.) on 3rd and 4th October, 1957, when judgment was given unanimously against the Crown, with costs.

Mr. John Senter, Q.C., and Mr. E. B. Stamp appeared as Counsel for the Crown, and Mr. Philip Shelbourne for the Company.

Jenkins, L.J.—We need not trouble you, Mr. Shelbourne.

This is an appeal by the Commissioners of Inland Revenue from a judgment of Harman, J., dated 16th July, 1957, whereby he affirmed a determination of the Special Commissioners in favour of the taxpayer concerned, namely, a company called Wood Bros. (Birkenhead), Ltd.

There is no dispute as to the facts, which are sufficiently dealt with in the Case Stated and in the judgment of the learned Judge, and I need only refer very briefly to the essential points. It is common ground that this Company was a company amenable to the provisions relating to Surtax on undistributed income of certain bodies corporate now to be found in Chapter III of Part IX of the Income Tax Act, 1952. It is further common ground that under these provisions, in the events which have happened, it is proper that the income of the Company should be apportioned amongst its members. It is further not in dispute that the accounts of the Company were last made up for the period ending 29th, I think it is (though it sometimes seems to be stated as 30th), April, 1950; so that the relevant period for the present purpose, the Company having gone into liquidation, is the period from 29th or 30th April, 1950, to the date of the commencement of the winding-up, namely, 16th April, 1952. Furthermore, all figures are agreed between the parties, and the appeal involves one point and one point only.

The Company contends that the proper amount of income liable to be apportioned to the members is £57,589. The Crown do not dispute that figure, as a figure, but they say that a further sum ought to be included, namely a sum of £18,675, being the amount of a balancing charge which became chargeable under the relevant provisions of Part X of the Act of 1952, which re-enacted in substance provisions formerly to be found in the Income Tax Act, 1945. There is no dispute that the case is one in which it is proper for a balancing charge to be made, and there is no dispute as to the figure of £18,675, the point at issue being simply whether the amount of that balancing charge is part of the Company's actual income from all sources for the relevant period so as to make it proper to be included in the figure of income to be apportioned amongst the members.

I should next refer to some of the provisions of the Act, beginning with the leading provisions on the matter of Surtax on undistributed income of companies. The familiar Section 245, formerly Section 21 (1) of the Finance Act, 1922, is in these terms:

“With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which

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would otherwise be distributed, it is hereby enacted that where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that, for purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members."

Then Section 248 provides:

"(1) Where a direction has been given under section two hundred and forty-five of this Act with respect to a company, the apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members."

Then there are machinery provisions with which I need not trouble. I can go to Section 253, which deals with the case of a company in liquidation. That provides:

"(1) Where an order has been made or a resolution passed for the winding up of a company to which section two hundred and forty-five of this Act applies—(a) the income of the company for the period from the end of the last year or other period for which accounts of the company have been made up to the time of the commencement of the winding up shall, for the purposes of the said section, be deemed to be income of that period available for distribution to the members of the company; and (b) as respects that period, and the next preceding year or other preceding period or periods ending within that next preceding year for which accounts have been made up, the said section shall apply as if the words 'within a reasonable time' were omitted therefrom."

That provision admittedly applies to the Company, as does Section 245, and the income in question is the actual income of the Company from all sources from the date to which its accounts were last made up down to the commencement of the winding-up. Finally, I should refer to a definition in Section 255 (3). That Sub-section is in these terms:

"In computing, for the purposes of this Chapter, the actual income from all sources of a company for any year or period, the income from any source shall be estimated in accordance with the provisions of this Act relating to the computation of income from that source, except that the income shall be computed by reference to the income for such year or period as aforesaid and not by reference to any other year or period."

Pausing there, it follows that the balancing charge in the present case cannot be included in the income for apportionment amongst the members unless it is within the terms of this definition part of the actual income of the Company from all sources for the relevant year or period, and it is in effect round this definition and its implications that the argument in this appeal has centred.

To reach a view on the question whether the balancing charge bears the character of actual income of the Company from any source for the period in question, so as to bring it within the definition and make it a proper subject of apportionment, it is necessary to consider the provisions of the Act relating to allowances and charges of the kind here in question. This elaborate legislation as to allowances and charges in respect of machinery and plant was, as I have said, originally enacted by the Income Tax Act, 1945, and it is now to be found in Part X of the Act of 1952. There have been some amendments which do not, I think, touch this case. Section 279 provides this:

"(1) Subject to the provisions of this Act and, in particular, subject to the provisions of subsection (5) of this section, where a person carrying on

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a trade incurs capital expenditure on the provision of machinery or plant for the purposes of the trade, there shall be made to him, for the year of assessment in the basis period for which the expenditure is incurred, an allowance (in this Chapter referred to as 'an initial allowance') equal to "

—then a fraction is mentioned—

"of the expenditure."

The fraction seems to have been altered by subsequent legislation, but I think it was under the Income Tax Act, 1952, two-fifths and has since been reduced to one-fifth. Nothing, however, turns upon that. Then Section 280 deals with annual allowances:

"Subject to the provisions of this Act, where the person carrying on a trade in any year of assessment has incurred capital expenditure on the provision of machinery or plant for the purposes of the trade, an allowance (in this Chapter referred to as 'an annual allowance') shall be made to him for that year of assessment on account of the wear and tear of any of the machinery or plant which belongs to him and is in use for the purposes of the trade at the end of the basis period for that year of assessment."

The basis period, I should perhaps mention, is defined in Section 325, and that provides:

"(1) In this Part of this Act, 'basis period' has the meaning assigned to it by the following provisions of this section."

I do not think I need go into those provisions as in the present case the relevant period is the actual period with which we are concerned.

Then I think the next Section to which I need refer is Section 292. That appears under the cross-heading, "Balancing Allowances, Balancing Charges, etc.", and it provides—I am reading the Section as it originally stood:

"(1) Subject to the provisions of this section, where any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or an annual allowance has been made for any year of assessment to a person carrying on a trade, that is to say, either—(a) the machinery or plant is sold, whether while still in use or not; or (b) the machinery or plant, whether still in use or not, ceases to belong to the person carrying on the trade by reason of the coming to an end of a foreign concession; or (c) the machinery or plant is destroyed; or (d) the machinery or plant is put out of use as being worn out or obsolete or otherwise useless or no longer required, and the event in question occurs before the trade is permanently discontinued, an allowance or charge (in this Chapter referred to as 'a balancing allowance' or 'a balancing charge') shall, in the circumstances mentioned in this section, be made to, or, as the case may be, on, that person for the year of assessment in his basis period for which that event occurs . . . (2) Where there are no sale, insurance, salvage or compensation moneys or where the amount of the capital expenditure of the person in question on the provision of the machinery or plant still unallowed as at the time of the event exceeds those moneys, a balancing allowance shall be made, and the amount thereof shall be the amount of the expenditure still unallowed as aforesaid, or, as the case may be, of the excess thereof over the said moneys. (3) If the sale, insurance, salvage or compensation moneys exceed the amount, if any, of the said expenditure still unallowed as at the time of the event, a balancing charge shall be made, and the amount on which it is made shall be an amount equal to the excess or, where the said amount still unallowed is nil, to the said moneys . . . (4) Notwithstanding anything in subsection (3) of this section, in no case shall the amount on which a balancing charge is made on a person exceed the aggregate of the following amounts, that is to say—(a) the amount of the initial allowance, if any, made to him in respect of the expenditure in question; and (b) the amount of any annual allowance made to him in respect of the machinery or plant in question",

and certain other matters which I do not think I need enter into. The Subsection imposes a ceiling or maximum designed broadly to recoup the amount

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of the allowances in cases where the losses which they represent have been more than offset by the sale of the plant or machinery. Then Section 301 provides:

"(1) Any allowance or charge made to or on any person under the preceding provisions of this Chapter shall, unless it is made under or by virtue of subsection (2) of section two hundred and ninety-six of this Act, or under or by virtue of section two hundred and ninety-eight of this Act, be made to or on that person in charging the profits or gains of his trade."

Then Section 323, which I think is the last one to which I need refer, provides:

"(1) Any claim by a person for an allowance falling to be made to him under any of the provisions of this Part of this Act in charging the profits or gains of his trade shall be included in the annual statement required to be delivered under this Act of the profits or gains thereof, and the allowance shall be made as a deduction in charging those profits or gains . . . (4) Any charge falling to be made under any of the provisions of this Part of this Act on a person for any year of assessment in charging the profits or gains of his trade shall be made by means of an assessment on the profits or gains of that trade for that year of assessment in addition to any other assessment falling to be made thereon for that year."

I think those are all the statutory provisions on this matter of balancing allowances and balancing charges to which I need refer.

In the present case, the Company in fact ceased business on 28th April, 1951, and at or about the same time it sold the plant or machinery. As appears from what I have already said, this was a case in which allowances had been made. I think an initial allowance was made (I am not sure if that is positively found in the Case) and there were annual allowances, and the sale of the plant and machinery realised an excess of the proceeds as compared with the amount of the depreciation or capital loss allowed for, and consequently the excess became the subject of a balancing charge.

The learned Judge rejected the appeal of the Crown in effect, I think, on two grounds. First, he said the amounts expended or losses incurred in relation to plant or machinery were capital losses, and any profit realised on the sale of the plant and machinery was in like manner a capital profit, and he said no question of income arose in this case at all. There was simply a figure which might be regarded as a capital gain realised on the sale of the plant and machinery, and in his view, on this aspect of the case, if the amount of the capital gain had been made by the legislation a subject for charge to Income Tax, it was in fact tax on something which was not income at all but was capital.

Mr. Senter, for the Crown, combated that view by reference, amongst other cases, to the case of *London County Council v. Attorney-General*⁽¹⁾. [1901] A.C. 26, for the well-known statement of the law by Lord Macnaghten at page 35:

"Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income tax assessed under Sched. D and those assessed under Sched. A or any of the other schedules of charge. One man has fixed property, another lives by his wits; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all. Sched. A contains the duties chargeable for and in respect of the property in all lands, tenements, and hereditaments capable of actual occupation. There the standard is annual value. It is difficult to see what other standard could have been adopted

(1) 4 T.C. 265, at pp. 293-4.

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as a general rule. But there again, if the subject of charge be lands let at rack-rent, the annual value is 'understood to be the rent by the year at which the same are let.' In every case the tax is a tax on income, whatever may be the standard by which the income is measured."

Mr. Senter used that passage to show that income for Income Tax purposes may be the subject of a notional or conventional measurement, and that in the present case the balancing charge might well be income for tax purposes although its amount was arrived at by reference to a figure of capital gain. To the same end, Mr. Senter also referred to a passage from *Glenboig Union Fireclay Co., Ltd. v. Commissioners of Inland Revenue*, 12 T.C. 427. The case concerned a sum received by a company which operated pits of fireclay in consideration of their permanently discontinuing the winning of fireclay in a particular place. The question was, as I understand it, whether the sum paid there was income for Income Tax purposes, and Lord Buckmaster said this, at page 463 :

"It is unsound to consider the fact that the measure, adopted for the purpose of seeing what the total amount should be, was based on considering what are the profits that would have been earned. That, no doubt, is a perfectly exact and accurate way of determining the compensation, for it is now well settled that the compensation payable in such circumstances is the full value of the minerals that are to be left unworked, less the cost of working, and that is, of course, the profit that would be obtained were they in fact worked. But there is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test. I am unable to regard this sum of money as anything but capital money, and I think therefore it was erroneously entered in the balance sheet ending 31st August, 1913, as a profit on the part of the Fireclay Company."

So far, I agree with Mr. Senter that the fact that the amount of the balancing charge is arrived at by means of a capital calculation does not necessarily conclude the question as to its character for Income Tax purposes, as it seems to me that a sum so calculated may well be income for those purposes if the relevant legislation declares it to be such. But it clearly cannot be said in itself to bear the character of income at all.

The other line of reasoning which appealed to the learned Judge was based, in effect, on Section 255 (3) of the Act. If I might read that again :

"In computing, for the purposes of this Chapter, the actual income from all sources of a company for any year or period, the income from any source shall be estimated in accordance with the provisions of this Act relating to the computation of income from that source, except that the income shall be computed by reference to the income for such year or period as aforesaid and not by reference to any other year or period."

The learned Judge naturally attached great importance to the word "actual" both in that passage and in Section 245 and other Sections dealing with Surtax on undistributed income of companies. The learned Judge took the view that "actual income" meant, as I understand him, income in the popular sense of that expression, as opposed to fictional or notional income, and he concluded that the amount of the balancing charge could not be said to be part of the actual income of the Company.

If "actual" is used in the sense accorded to it by the learned Judge, that is to say, the real or the true, as opposed to the hypothetical or fictitious or notional, income, then his view, I think, would clearly be right. But light is thrown upon the meaning of the word "actual" in a case to which the learned Judge was not referred. That was *Thomas Fattorini (Lancashire)*,

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Ltd. v. Commissioners of Inland Revenue, 24 T.C. 328. I can go straight to the passages in the judgments of Scott, L.J., and of Lord Atkin in the House of Lords on which Mr. Senter relied. At page 340, Scott, L.J., said this :

"It was contended for the Company that its 'actual income' (within the meaning of Section 21) for the two years in question consisted solely of the dividends receivable on the whole of the shares in the three operative companies ; that, in the circumstances, the actual income and the dividends in fact meant the same thing, so that apparently the Company had contracted itself out of the whole of its 'actual income'. But that statement of the position is only a half-truth. The dividends, no doubt, constituted the Company's gross receipts, but not its 'income' for Income Tax purposes ; the interest paid to the bank, for instance, had to be deducted from the gross receipts. But if by the contention it was intended to base an inference of fact that the Company possessed no assets out of which it could raise money, to take the place of income which it had found it convenient to devote to a capital purpose, with a view to a declaration of dividend, the facts do not support the inference."

Then, at page 342, the learned Lord Justice said this :

"Our reasons are these. The judgment of Rowlatt, J., attached a meaning to the expression 'actual income' with which we disagree. He treated it as connoting the receipts side only of the income account. He assumed that if the actual receipts in the statutory year mentioned in Section 21 had been assigned or hypothecated under a binding contract, the Company's 'actual income' had passed out of its control and, therefore, ceased to be available for distribution. This, in our opinion, is an error. The true meaning of the phrase, we think, is indicated by the context, and by certain provisions of the Act of 1918. 'Income tax . . . is a tax on income . . . whatever may be the standard by which the income is measured' "

—that, of course, is a reference to Lord Macnaghten's speech in *London County Council v. Attorney-General*(¹), to which I have already referred—

"and the phrase 'profits and gains' in Income Tax legislation is, at any rate under Schedule D, no more than a synonym for 'income'. For purposes of assessment the income of an anterior period was and is 'deemed to be the income' of the person charged for the year of assessment ; he is charged on a conventional or putative, and not the actual income ; till 1927 it was an average of three years ; since then it has been of the preceding year."

Then he goes on to deal with the case of Super-tax, the total income in that case also falling to be ascertained on the previous year's basis, and he refers to some of the provisions dealing with that. He goes on, at the bottom of page 342 :

"Finally, Rule 8 of the Rules applicable to Cases I and II of Schedule D, reproducing Section 24 of the Finance Act, 1907, but repealed by the Finance Act, 1926, provided that where 'the actual profits or gains', i.e., the income, ' . . . in the year of assessment fall short of the profits or gains as computed in accordance with this Act, he shall be entitled to be charged on the actual amount of the profits or gains so arising, instead of on the amount of the profits or gains so computed'. That Rule, in the Act of 1918, we think, supplies the key to the meaning of the word 'actual' in Section 21 of the Act of 1922, which called for interpretation in the *Glazed Kid* case(²) and calls for it in the present case. It was inserted to make it clear that it is not the conventional, but the *de facto* income of the year in question which is the subject to the duty to distribute. The epithet 'actual' in such a sense is illustrated in Income Tax law by the Finance Act, 1907, Section 24, Sub-sections (2) and (3), where the successor to a continuing business and his predecessor who ceases to carry it on, is taxed on his 'actual income' in the two broken periods of the year. The fact that the word is used in that sense in Income Tax legislation still in force in 1922 seems to us conclusive."

(¹) 4 T.C. 265, at pp. 293-4.

(²) *Glazed Kid, Ltd. v. Commissioners of Inland Revenue*, 15 T.C. 445.

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Lord Atkin, at page 352, said :

"It will be convenient here to deal with the argument which was pressed upon us by Mr. Donovan that in the present case the dividends from the operative companies' shares formed the whole of the 'actual' income of the Company within the meaning of Section 21 of the Act of 1922, and that as the whole of that 'actual' income had been assigned to the bank there was no part of it which could have been distributed. My Lords, the Court of Appeal have effectively disposed of this argument. Actual income does not mean the specific receipts that come in from time to time, but the 'Income Tax income' as calculated at the end of the year of assessment. To hold otherwise would make nonsense of the Section when applied to commercial companies, who use their receipts as soon as they come in, and hardly ever have left for distribution the actual incomings as sought to be defined in the argument."

I accept Mr. Senter's submission that the observations of the Court in that case make it reasonably plain that we should treat the word "actual" here in the phrase "the actual income from all sources" as meaning the income for the actual period in respect of which the assessment is made, as distinct from the income from some other basis period of a conventional kind such as the previous year or, as it once was, the three years' average selected as the basis of calculation; and, that being referable to that matter, the word "actual" does not have the restrictive effect which Harman, J., attributed to it. Accordingly, the circumstance that the balancing charge was not actual income, meaning thereby income in the literal or real sense of the word, but if it was income at all was a sum to which the character of income had been notionally attributed by the legislation would not necessarily exclude it from the calculation of the Company's total income from all sources. But that does not conclude the matter, for, even so, it is necessary to my mind to find somewhere in the relevant provisions of the Act some sufficiently clear and unambiguous provision to the effect that the amount of the balancing charge shall be deemed to be an addition to the income of the Company for the period in question. It seems to me that Mr. Senter, notwithstanding his detailed and careful argument, has not succeeded in doing that. I find nothing to say that this particular sum is to be deemed to be income in the hands of the Company.

I would refer, in that connection, once more to Section 323, and I refer to that because of what appears to me to be a somewhat significant change of language which is to be found when one compares the terms of Sub-section (4) with the terms of Sub-section (1). Sub-section (1) deals with allowances, and it says :

"Any claim by a person for an allowance falling to be made to him under any of the provisions of this Part of this Act in charging the profits or gains of his trade shall be included in the annual statement required to be delivered under this Act of the profits or gains thereof, and the allowance shall be made as a deduction in charging those profits or gains."

One would have thought that in the case of a charge if it had been so intended the converse would have been provided for, and the amount of the balancing charge would have been directed to be added to the amount of the profits or gains; but Sub-section (4) is not so framed, and it provides :

"Any charge falling to be made under any of the provisions of this Part of this Act on a person for any year of assessment in charging the profits or gains of his trade shall be made by means of an assessment on the profits or gains of that trade for that year of assessment in addition to any other assessment falling to be made thereon for that year."

There is to be an assessment on the profits or gains of that trade for that year in addition to any other assessment falling to be made thereon for that year, but there is nothing that I can see which says that the amount of a balancing

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charge must be added to the amount of profits or gains. It is true that there is to be a surcharge on profits or gains to the extent of the balancing charge, but that does not to my mind involve the conclusion that the balancing charge becomes part of the actual income from all sources for the relevant period. No doubt it must be brought in in some way for the purposes of calculation, but it does not follow from that that it must be treated as part of the Company's income for all purposes.

There were other authorities to which Mr. Senter referred, and in particular *Kirkness v. John Hudson & Co., Ltd.*⁽¹⁾, [1955] A.C. 696, which is of interest because it discussed these very provisions, which at that time were to be found in the Income Tax Act, 1945. The question there was, as I understand it, whether a balancing charge was payable by reason of the compulsory acquisition of railway wagons belonging to a certain company, so that the actual matter which had to be decided was whether a compulsory acquisition of the kind that had taken place there was a sale within the meaning of the legislation dealing with balancing charges; but views were expressed on the character of the Act by Lords Morton and Reid, to which Mr. Senter referred us. Lord Morton said this, at page 716⁽²⁾:

"The Act of 1945 greatly extended the scheme of capital allowances for depreciation of capital assets, for the purpose of the taxation of the profits of business undertakings; a special feature of such allowances was the making of an initial allowance upon the acquisition of the asset, in addition to subsequent annual allowances. The object of the provisions contained in section 17 (1) (a) is, I think, plain. The legislature realised that machinery or plant might be sold before the trader had obtained the full amount of the depreciation allowances which might have accrued in respect thereof, and the moneys received on the sale might be less than the written-down value of the asset. This would indicate that the depreciation allowances had not been sufficiently generous in this particular instance, and by way of putting the matter right a 'balancing allowance' became claimable by the trader. Conversely, if the moneys received on the sale were in excess of the written-down value of the asset, a 'balancing charge' was imposed, in order to restore to the public revenue the amount by which the past allowances were shown to have been excessive."

Then, at page 729⁽³⁾, there was this passage in the judgment of Lord Reid. He said:

"I find nothing in the Income Tax Act, 1945, to justify giving to the word 'sale' a meaning wider than its ordinary meaning. In a taxing Act, and particularly in a charging section, one assumes that language is used accurately unless the contrary clearly appears, and, in my opinion, section 17 is a charging section. It is the only section which could authorise the assessment in this case. It is true that its provisions may sometimes favour the taxpayer by entitling him to a balancing allowance. But that does not prevent it from being a charging section as regards those whom it makes liable to pay tax, and 'no tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him' (*per* Lord Blackburn in *Coltress Iron Co. Ltd. v. Black*⁽⁴⁾). It may be that there is no apparent reason why the taxpayer should be subject to a balancing charge or entitled to a balancing allowance if his plant is sold, but not if it is taken compulsorily, but 'if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be' (*per* Lord Cairns in *Partington v. Attorney-General*⁽⁵⁾)."

In contradistinction to that passage from Lord Reid's judgment, Lord Morton had expressed the view that this was not a charging Section. He said, at page 723⁽⁶⁾:

"It is true that in one event the section imposes a charge upon the subject, but it is equally true that in another event it confers a benefit upon him, and

⁽¹⁾ 36 T.C. 28.

⁽²⁾ *Ibid.*, at p. 65.

⁽³⁾ *Ibid.*, at p. 75.

⁽⁴⁾ 6 App. Cas. 315, at p. 330; 1 T.C. 287, at p. 316.

⁽⁵⁾ L.R. 2 H.L. 100, at p. 122.

⁽⁶⁾ 36 T.C. 28, at p. 71.

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the words 'is sold' must bear the same meaning in each event. In these circumstances, I do not think that the principle of strict construction of a charging section can be applied in this case."

Those passages do not appear to me really to afford much assistance in the present case, and I share the difficulty expressed by Harman, J., in applying the principle that a charging Section or charging provision must be strictly construed. All one can do is to construe the provisions of any enactment according to their tenor as best one can. If they are advanced to the Court as imposing some charge, the Court rightly requires that the intention of imposing a charge should be expressed in clear terms; and if there is, in truth, any ambiguity, it should be resolved against the person seeking to set up the charge. But really this comes to very little more than saying that provisions imposing charges, like any other statutory provisions, must be construed according to their language.

Mr. Senter attached some importance to the passage from Lord Morton's judgment which I have just read at [1955] A.C. 716⁽¹⁾, where he said, at the conclusion of the passage:

"a 'balancing charge' was imposed, in order to restore to the public revenue the amount by which the past allowances were shown to have been excessive."

Mr. Senter says that, bearing that principle in mind, this emerges clearly as an income transaction, the position in a case such as this being that events, as they ultimately turn out, show that the taxpayer has been accorded relief from Income Tax on the strength of losses which in the end of all do not materialise or are fully recouped by the sale of the plant or machinery in relation to which the allowances are given. The position then is that the taxpayer has paid too little tax, and the provisions dealing with balancing charges are designed to rectify that. The balancing charge thus appears as an item invested with the character of income, introduced into the assessment to Income Tax of the given taxpayer so as to rectify the underpayment due to the allowances made in past years. That line of argument is attractive, but it suggests that the intention enacted would have been better carried out by provisions enabling assessments for past years to be reopened and for the adjustment to be made year by year. Be that as it may, this argument, while it indicates the policy of these statutory provisions, does nothing so far as I can see to carry the Crown's case any further on the question whether the balancing charge is part of the actual income from all sources of the Company. Accepting what was said by Scott, L.J., on the meaning of "actual" in this context, I still find it necessary that it should be shown that by some express statutory provision this notional item represented by the balancing charge is to be deemed for Income Tax purposes to be income of the Company. Finding no such provision, I think it necessarily follows that the appeal here fails.

We were referred to various other authorities, but none, I think, really has any bearing on this matter, with the exception of *Townsend v. Electrical Yarns, Ltd.*⁽²⁾, which was a case heard by Donovan, J., the facts being quite different from those in this case. Donovan, J., came to the conclusion that the amount of the balancing charge ought not to be included in the profits of the year in which it was to be charged, and he regarded that assessment as a separate matter from the ordinary assessment. Accordingly, he seems so far to have taken very much the same view as I have done on the question of the balancing charge.

(1) 36 T.C. 28, at p. 65.

(2) 33 T.C. 166.

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For the reasons I have endeavoured to state, I think this appeal fails and should be dismissed.

Parker, L.J.—I entirely agree, and there is nothing which I can usefully add.

Pearce, L.J.—I agree.

Mr. Philip Shelbourne.—Will your Lordships say, with costs?

Jenkins, L.J.—Well, that follows ; yes.

Mr. John Senter.—My Lords, I am instructed to ask your Lordships for leave to take this matter to the House of Lords.

Jenkins, L.J.—What do you say to that, Mr. Shelbourne?

Mr. Shelbourne.—Well, my Lord, I am instructed to oppose my learned friend's application. This is the third time that my friend's clients have lost this case. It has been before the Special Commissioners, Harman, J., and your Lordships' own Court, and I need hardly call your Lordships' attention to the fact that you did not require any argument to be addressed to you by the taxpayer. As your Lordships can imagine, the sum at stake for this particular taxpayer is not a very large one—it is only Surtax on the balancing charge—and I would respectfully submit that it would be a great hardship for this taxpayer to be taken to the House of Lords to satisfy these general points to which my friend has referred on behalf of his clients.

Jenkins, L.J.—Well, Mr. Senter, it is a matter of some general importance, as so many of these tax cases are, but I think one is reluctant to see a taxpayer pursued from Court to Court in order to establish some propositions of general interest. I think perhaps it is the kind of case where terms might be imposed as to costs if leave is given. When it comes to imposing terms, I think very often their Lordships are in a better position to do that than we are. So I wonder if we might leave it like this. If so advised, it would be open to your clients to apply for leave to appeal to their Lordships' House, and if their Lordships see fit to grant you leave no doubt they will also impose some terms as to costs. In all the circumstances, I think that would be the best thing to do.

Parker, L.J.—Yes.

Pearce, L.J.—I agree.

Jenkins, L.J.—This is the third run of it, and everyone has been unanimous, and if you go to the House of Lords it will be the fourth time.

Mr. Senter.—I fully appreciate what your Lordship says, and if your Lordships do not feel disposed to deal with it on any terms which your Lordships like to impose, then the position is left clear by what your Lordship has said.

Jenkins, L.J.—I think from both points of view—the point of view that you have already had three innings, so to speak, and the point of view of possible terms as to costs—we had better leave it like that.

Mr. Senter.—If your Lordship pleases.

Jenkins, L.J.—You agree, do you not, Mr. Shelbourne?

Mr. Shelbourne.—Yes, I agree, my Lord.

On the petition of the Crown, leave to appeal against the above decision was granted on 10th December, 1957, by the Appeal Committee of the House of Lords (Lords Reid, Tucker and Somervell of Harrow), on the terms that the Crown should undertake not to disturb the Order for costs below and, in any event, to pay the Company's costs in the House of Lords on a solicitor and client basis; and, further, that the Crown should undertake to pay interest at 3 per cent. on the amount of tax in dispute in addition to the $2\frac{1}{2}$ per cent. payable to the liquidator, while the money was deposited with them, by the Board of Trade⁽¹⁾.

Mr. Alan Orr appeared as Counsel for the Crown, and Mr. Philip Shelbourne for the Company.

The case came before the House of Lords (Viscount Simonds and Lords Morton of Henryton, Reid, Keith of Avonholm and Somervell of Harrow) on 3rd, 4th and 5th November, 1958, when judgment was reserved. On 18th December, 1958, judgment was given against the Crown, with costs (Viscount Simonds and Lord Keith of Avonholm dissenting).

Sir John Senter, Q.C., Mr. E. B. Stamp and Mr. Alan Orr appeared as Counsel for the Crown, and Mr. F. Heyworth Talbot, Q.C., Mr. Philip Shelbourne and Mr. M. P. Nolan for the Company.

Viscount Simonds.—My Lords, I am so fully in agreement with the opinion of my noble and learned friend Lord Keith of Avonholm that I can be very brief in stating my own views. Nor shall I occupy your Lordships' time in stating the many Sections of the Income Tax Act, 1952, to which reference was made in the course of the argument. The Act contains over 500 Sections and 25 Schedules. A considerable number of them were relied on by one side or the other. The question is in fact a very short one. It is whether the amount in respect of which a so-called "balancing charge" was properly made upon the Respondent Company under Sections 292 (1) and 323 (4) of the Act was part of its actual income from all sources for the relevant period within the meaning of Section 245 of the Act. If so, that amount was apportionable among the members of the Respondent Company and the apportionment made by the Special Commissioners was properly made. But it has been held by Harman, J., upon a Case stated by the Commissioners, and for different reasons by the Court of Appeal, that the amount in question ought not to be regarded as part of its actual income for the period in question.

The argument was twofold: first, as was held by the Court of Appeal, that no statutory enactment provided that the amount on which the balancing charge was assessed should be deemed to be income of the Company for Income Tax purposes; and, secondly, that in any case it was not part of the actual income of the Company from all sources. If the first argument prevailed, the second argument was unnecessary; it was not suggested that the amount in question could be actual income of the Company if it was not income at all.

⁽¹⁾ See the Companies Act, 1948, s. 343, and the Companies (Winding-up) Rules, 1949 (S.I. 1949 No. 330), r. 199.

(Viscount Simonds.)

My Lords, it appears to me that the construction placed by the Court of Appeal upon the relevant Sections of the Act is too narrow. The purpose of the balancing charge is not in doubt. I respectfully adopt the language of my noble and learned friend Lord Morton of Henryton in the recent case of *Kirkness v. John Hudson & Co., Ltd.*⁽¹⁾, [1955] A.C. 696, at page 716 :

“Conversely, if the moneys received on the sale were in excess of the written-down value of the asset, a ‘balancing charge’ was imposed, in order to restore to the public revenue the amount by which the past allowances were shown to have been excessive.”

The allowances were made in respect of the computation of profits or gains for purposes of Income Tax, the part of the public revenue affected was that which was derived from Income Tax, and the balancing charge is made in order to restore to that tax an amount by which it has been mistakenly reduced. Call it notional or artificial or what you will, it is an amount which for the purpose of Income Tax is as truly part of the subject's income as is, for instance, the notional or artificial amount which is under Schedule A regarded as his income. My noble and learned friend Lord Keith of Avonholm will exhaustively examine the relevant Sections ; I hope, therefore, I may not be thought to be wanting in respect to those who take a different view if I say that in my opinion the solution of the problem lies in remembering that in the Act the word “income” has a special meaning, namely, a sum which is by the Act charged to Income Tax and measured in accordance with its provisions, and that, specifically, where Case I of Schedule D is in question, “profits or gains” is an expression synonymous with “income”. It is because the amount on which the balancing charge is assessed falls within that Case that it is brought into charge as income. I do not wish to elaborate what my noble and learned friend will say, but I cannot refrain from observing upon the incongruity of the conclusion to which in the case of a company the Court of Appeal has come with the result in the case of an individual trader. His Surtax liability appears to be concluded by Section 524 (4) of the Act. I agree too that no little weight should be attached to the language of Section 270 (6) (c). In that Sub-section, quite naturally and in my opinion rightly, that “which is the subject of a balancing charge under this Chapter” is called “income”. So, in my opinion, it is for all the purposes of the Act.

But it remains to determine whether it is “actual income” within Section 245. This expression is defined in Section 255 (3). I do not think it necessary to look beyond its terms. It clearly has a purely temporal significance ; it means income as defined, computed and measured by the Act but by reference to a particular period. That is in accordance with what Lord Atkin said in *Thomas Fattorini (Lancashire), Ltd. v. Commissioners of Inland Revenue*, 24 T.C. 328 (at page 352), and it is perhaps permissible to add that if it means anything else there is no guide to what it does mean. I would only add that I agree with the observations of my noble and learned friend Lord Morton of Henryton upon what Lord Uthwatt said in *Lord Howard de Walden v. Commissioners of Inland Revenue*, 30 T.C. 345 (at page 370).

I would therefore allow this appeal, but, as I understand that the majority of your Lordships think otherwise, it must be dismissed.

(¹) 36 T.C. 28, at p. 65.

Lord Morton of Henryton.—My Lords, the parties in this case agree (1) that a “balancing charge” was properly made upon the Respondent Company under Sections 292 and 323 (4) of the Income Tax Act, 1952; (2) that “the amount on which the balancing charge is made” was correctly computed, under the same provisions of that Act, at the sum of £18,675; (3) that, on the true construction of the Act, once the amount on which the balancing charge is made has been ascertained, the balancing charge is Income Tax on that amount at the appropriate rate. The one question which remains for decision is whether the sum of £18,675 already mentioned is or is not part of the “actual income from all sources” of the Respondent Company for the relevant period, within the meaning of Section 245 of the Act. If this question is answered in the affirmative, it follows that a direction and apportionment has been properly made under Section 245, with the result that the members of the Company are liable to pay any appropriate amount of Surtax on the sums apportioned to them respectively.

Counsel for the Company submitted, first, that the £18,675 was not income of the Company within the meaning of Section 245, and, secondly, that if this sum could properly be described as income it was not actual income within the meaning of the Section. My Lords, I would accept Counsel’s first submission. I have had the pleasure of reading the speech which is about to be delivered by my noble and learned friend Lord Reid. I entirely agree with his reasoning and conclusion, and I shall only add some observations upon certain passages in speeches delivered in this House which were much discussed in the course of the argument. In *Thomas Fattorini (Lancashire), Ltd. v. Commissioners of Inland Revenue*, [1942] A.C. 643, at page 658, Lord Atkin said⁽¹⁾:

“Actual income does not mean the specific receipts that come in from time to time, but the ‘income tax income’ as calculated at the end of the year of assessment. To hold otherwise would make nonsense of the section when applied to commercial companies, who use their receipts as soon as they come in, and hardly ever have left for distribution the actual incomings as sought to be defined in the argument.”

In *Lord Howard de Walden v. Commissioners of Inland Revenue*, 30 T.C. 345, at page 370, Lord Uthwatt said:

“My Lords, for myself I am content to take the view that, in light of the context, the words ‘actual income’ can mean only income which is in some real sense capable of distribution. Apart from that context, indeed, the phrase ‘actual income’ is hardly apt to include fictional income; and non-existent income composed of amounts deemed to be income is fictional income.”

In each case these observations were directed to the words “actual income” in Section 21 of the Finance Act, 1922; but the wording of that Section does not differ in any material particular from the wording of Section 245 of the Income Tax Act, 1952, and Paragraph 6 of the First Schedule to the Finance Act, 1922, is reproduced in Section 255 (3) of the Act of 1952.

My Lords, when Lord Atkin, in *Fattorini’s* case, used the words I have just quoted, he was dealing with an argument which had been pressed on the House by Counsel for the appellant, and he was concerned only to reject the contention that “actual income” means the specific receipts of the company. It would not be right to construe his words as an expression of opinion that every sum upon which Income Tax is payable is necessarily actual income within the meaning of the Section, and unless his words can be so construed they do not assist the argument of Counsel

⁽¹⁾ 24 T.C. 328, at p. 352.

(Lord Morton of Henryton.)

for the Crown in the present case. In the *Howard de Walden* case⁽¹⁾ Lord Uthwatt was dealing with a contention that, where actual income from all sources of company No. 1 is attributed to company No. 2 as the result of an apportionment, that attributed income is part of the actual income from all sources of company No. 2, so that it could be further apportioned under Section 21 of the Finance Act, 1922, to the shareholders of company No. 2. In rejecting that contention he pointed out, as did Asquith, L.J., in the Court of Appeal⁽²⁾, that, if the contention were right, Section 32 of the Finance Act, 1927, which provides for such sub-apportionment, would have been unnecessary. I do not think it would be right to treat the words of Lord Uthwatt which I have quoted as amounting to a decision on any question wider in its scope than the question with which he was dealing, and it is noteworthy that he did not refer in his speech to the provisions as to computing the actual income which were then contained in Paragraph 6 of the First Schedule to the Finance Act, 1922, and are now in Section 255 (3) of the Income Tax Act, 1952.

I would dismiss the appeal.

Lord Reid.—My Lords, the Respondent Company carried on business as wholesale grocers until 28th April, 1951. On that date it sold its business and ceased to trade. Then on 16th April, 1952, it went into voluntary liquidation. On 11th March, 1955, the Special Commissioners of Income Tax, in pursuance of Section 245 of the Income Tax Act, 1952, directed that for the purposes of assessment to Surtax the actual income of the Company from all sources for the period 30th April, 1950, to 16th April, 1952, should be deemed to be the income of the members of the Company. It is admitted that the Commissioners were entitled to give that direction for that period. On the same day, 11th March, 1955, the Commissioners, in pursuance of Section 248 (1) of the Act, apportioned the actual income of the Company for that period among the members. They determined the amount of the actual income to be apportioned as £76,264. No objection is taken to the method of apportionment. The sole question in this appeal is whether the Commissioners were entitled to take that sum as the actual income of the Company for that period. That sum includes a sum of £18,675, and the Respondent contends that this sum was not part of the actual income of the Company within the meaning of Section 245 of the Act, and that the Commissioners were therefore only entitled to apportion among the members the sum of £57,589. The Respondent's contention was upheld by the Commissioners for the Special Purposes of the Income Tax Acts, who accordingly, on 28th August, 1956, reduced the amounts apportioned to a total of £57,589. An appeal by the Crown was dismissed by Harman, J., and a further appeal was dismissed by the Court of Appeal on 4th October, 1957.

The sum of £18,675 is the amount on which a balancing charge was made on the Company under Sections 292 and 323 of the Act in respect of its sales of plant and machinery on its ceasing to carry on business. It is admitted that this sum was correctly calculated and that the Company was properly assessed in respect of it. The question whether a sum on which a balancing charge is made is or is not part of actual income depends on the proper interpretation of the Sections of the Act which deal with those matters; but it will, I hope, make my subsequent observations rather more intelligible if I first try to indicate in outline the apparent purpose of the Act in providing for balancing charges.

(¹) 30 T.C. 345.

(²) *Ibid.*, at p. 363.

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Before 1945 there was statutory provision for allowances for depreciation or wear and tear of plant and machinery under Rule 6 of the Rules applicable to Cases I and II of Schedule D. If one assumes values in money remaining stable, the amount of the allowances on any item ought to be such that, when the trader comes to sell it, the price which he receives is equal to the price which he paid for it less the aggregate amount of the allowances which he has received in respect of it. If on selling the item he receives more than that amount, then, neglecting the effect of inflation, it could be said that the allowances made to him had been too large, and, as these allowances had been deducted year by year before assessment of his trading profits, he had therefore paid too little in Income Tax. Before 1945 there was no provision in the Income Tax Acts which enabled the Revenue to recover anything from the trader when the price which he received on the sale of an item showed that the trader had benefited in the past at the expense of the Revenue by having been granted too large allowances. And in the converse case, where the price received on sale showed that past allowances had been too small, there was no provision to enable the trader to receive a further allowance.

To put this right was clearly one of the objects of the elaborate code enacted in the Income Tax Act, 1945, and now set out in Part X of the Income Tax Act, 1952. Balancing charges were introduced to meet the case where the trader had received too large allowances in the past, and balancing allowances were introduced to meet the converse case. The provisions of the Act of 1952 are so elaborate that the scheme may appear more clearly if I only quote those parts of the Sections which appear to me to be directly relevant in the present case. Balancing charges and allowances are first dealt with in Section 292, which provides:

"292.—(1) Subject to the provisions of this section, where any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or an annual allowance has been made for any year of assessment to a person carrying on a trade, that is to say, either—
(a) the machinery or plant is sold, whether while still in use or not; or . . . and the event in question occurs before the trade is permanently discontinued, an allowance or charge (in this Chapter referred to as 'a balancing allowance' or 'a balancing charge') shall, in the circumstances mentioned in this section, be made to, or, as the case may be, on, that person for the year of assessment in his basis period for which that event occurs. . . . (2) Where there are no sale, insurance, salvage or compensation moneys or where the amount of the capital expenditure of the person in question on the provision of the machinery or plant still unallowed as at the time of the event exceeds those moneys, a balancing allowance shall be made, and the amount thereof shall be the amount of the expenditure still unallowed as aforesaid, or, as the case may be, of the excess thereof over the said moneys. (3) If the sale, insurance, salvage or compensation moneys exceed the amount, if any, of the said expenditure still unallowed as at the time of the event, a balancing charge shall be made, and the amount on which it is made shall be an amount equal to the excess or, where the said amount still unallowed is nil, to the said moneys".

Sub-section (4) then provides that in no case shall the amount on which a balancing charge is made exceed the aggregate of the allowances previously made to him in respect of the machinery or plant sold. That Section determines the amount on which a balancing charge is to be made. The way in which a balancing charge or a balancing allowance is made is provided by Sections 301 and 323, of which the relevant parts are as follows:

"301.—(1) Any allowance or charge made to or on any person under the preceding provisions of this Chapter shall . . . be made to or on that person in charging the profits or gains of his trade."

(Lord Reid.)

"323.—(1) Any claim by a person for an allowance falling to be made to him under any of the provisions of this Part of this Act in charging the profits or gains of his trade shall be included in the annual statement required to be delivered under this Act of the profits or gains thereof, and the allowance shall be made as a deduction in charging those profits or gains. . . . (4) Any charge falling to be made under any of the provisions of this Part of this Act on a person for any year of assessment in charging the profits or gains of his trade shall be made by means of an assessment on the profits or gains of that trade for that year of assessment in addition to any other assessment falling to be made thereon for that year."

I must now set out Section 245 of the Act, under which the Commissioners gave their direction, and Section 255 (3), which deals with the manner of computation of the actual income of the company, the question at issue in the present case. Those Sections are as follows:

"245. With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted that where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that, for purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members."

"255. . . . (3) In computing, for the purposes of this Chapter, the actual income from all sources of a company for any year or period, the income from any source shall be estimated in accordance with the provisions of this Act relating to the computation of income from that source, except that the income shall be computed by reference to the income for such year or period as aforesaid and not by reference to any other year or period."

With regard to the meaning of the phrase "actual income from all sources", Counsel referred to *Thomas Fattorini (Lancashire), Ltd. v. Commissioners of Inland Revenue*⁽¹⁾, [1942] A.C. 643, and *Lord Howard de Walden v. Commissioners of Inland Revenue*, 30 T.C. 345. But the circumstances in those cases were quite different from those in the present case, and I can get little assistance from what was said by Lord Atkin in the former case and by Lord Uthwatt in the latter case. It appears to me that in the present case I must take Section 255 (3) and determine whether, in making a computation of the actual income of the Company from all sources in the manner there directed, the sum subject to the balancing charge does or does not fall to be included. If it does, then the Crown succeeds, but if it does not, then this appeal must be dismissed.

Nothing turns in this case on the last part of Section 255 (3), but this part of the Sub-section may afford an explanation of the choice of the word "actual" in the phrase "actual income" in this Sub-section and in Section 245. This Sub-section was originally Paragraph 6 of the First Schedule to the Finance Act, 1922, which, by Section 21, first enacted the provisions which now form Section 245 of the Act of 1952. In 1922 trading profits were still computed on a three years' average, and the last part of this Sub-section then read:

"except that the income shall be computed by reference to the income for such year or period as aforesaid and not according to an average of more than one year or by reference to any year or period other than such year or period as aforesaid."

(1) 24 T.C. 328.

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So it is possible that the phrase "actual income" was there used to emphasise the fact that the income to be considered under Section 21 was the income for a particular year and not income computed on a three years' average. But whether that be so or not, Section 255 (3) in effect provides a definition of what is meant by "actual income"; it directs how actual income is to be computed, and, in my opinion, nothing can be included in actual income unless it can be brought within the words

"income from any source . . . estimated in accordance with the provisions of this Act relating to the computation of income from that source".

It was argued for the Crown that the sum made subject to the balancing charge was income and that its source was the trade carried on by the Company. Even if that were so, the question would still arise: was this sum income estimated in accordance with the provisions of this Act relating to the computation of income from the Company's trade? The ordinary provisions relating to the computation of trading income are those which relate to Schedule D, Case I, and they have nothing to do with balancing charges. So it appears to me that the question then is this: can the provisions of Sections 292, 301 and 323 properly be regarded as provisions of the Act relating to the computation of income from trade? I do not wish to overstress what has so often been said in this House to the effect that no tax can be imposed on a subject without words in an Act clearly showing an intention to lay a burden on him. If it appears by clear implication that the provisions of these Sections should be so regarded, that would, I think, be sufficient, and I shall therefore turn back to these Sections to consider whether their terms afford sufficient ground for any such implication.

Section 292 deals with the computation of the sum on which a balancing charge is to be made. Three things are to be taken into account in the case of a sale of plant or machinery: the price originally paid for it, the price received for it on sale and the aggregate of past allowances made in respect of it. The original cost less the past allowances is the "expenditure still unallowed". The sum made subject to the balancing charge is not in any normal sense income. The machinery or plant with reference to which it is calculated was a capital asset, and the cost of acquiring it was capital expenditure. So far as I can see, the only way in which the sum made subject to the balancing charge is related to income in the ordinary sense is that it represents a part, or it may be the whole, of the allowances made in past years, and that in those years those allowances were brought in as deductions after profits had been computed so as to reduce the trader's taxable income. So it has a relation to the trader's taxable income in past years but no relation to his actual income for the year in question. This Section does not provide expressly or by clear implication that the sum on which a balancing charge is made is to be deemed to be, or to be treated as, a trading receipt, nor does it provide that it is to be part of or to be aggregated with the trading income for the year in question. So far as this Section is concerned this sum is left to stand by itself.

This is in striking contrast with the provisions of Section 337, which deals with a comparable matter, the sale of an asset representing scientific research expenditure of a capital nature. There it is provided, by Sub-section (2) (b), that, if the proceeds of sale plus the allowances exceed the

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original cost, the excess or the amount of the allowances, whichever is the less,

"shall be treated as a trading receipt of the trade accruing at the time of the sale".

That provision was first enacted by the Finance Act, 1944, Section 29, and it was therefore before the eyes of the draftsman and of Parliament when balancing charges were first introduced.

The other two Sections on which the argument for the Crown was chiefly founded are Sections 301 and 323. They must, I think, be taken together. They deal, not with computation, but with the method of assessment of the balancing charge. The former provides that the charge is to be made in charging the profits or gains of the trade, and this is expanded by Section 323 (4), which provides that it is to be made by means of an assessment on the profits or gains and that this assessment is to be in addition to any other assessment thereon for the year. To my mind the question is whether these Sections clearly designate the sum made subject to the balancing charge as part of the trading income for the year in question, or whether they merely provide, as a matter of machinery, that the balancing charge shall be charged and assessed as if it was a charge on that trading income. It is, I think, of some importance that the assessment by means of which the charge is made is to be separate from the assessment in respect of trading profits. If it was intended that the sum made subject to the balancing charge should be treated for all purposes as part of the trading income for the year in question, Counsel were unable to suggest any reason why there should be this double assessment, and no reason occurs to me. Indeed, it would rather seem that the draftsman has deliberately avoided anything that could suggest that sums made subject to balancing charges are part of trading income for the year in question.

Then an argument was founded on Section 1 of the Income Tax Act, 1952. This Section links the annual Finance Acts with the Income Tax Act by providing that tax at the rates there enacted shall be charged for each year in respect of all property, profits or gains described or comprised in the Schedules. It was argued that unless the sum made subject to a balancing charge could be said to be described or comprised in Schedule D—it could not be in any other Schedule—then no tax on it could be recovered. So it was said that the intention must have been to make this sum a part of the trading income for the year in question—the only way in which it could become comprised in Schedule D. I am not at all satisfied that that is so. I think that a sufficient link between a balancing charge and the annual Finance Acts could be found in the provisions of Section 323 (4) that the charge shall be made by means of an assessment on the profits or gains of the trade for that year. An assessment for a particular year can only be at the rates enacted in the current Finance Act. And if the intention was, not to enact that the sum made subject to a balancing charge is to be deemed to be income for all purposes, but merely to enact that for the particular purpose of this assessment it should be treated as if it were trading income of the year in question, then I think that those provisions were appropriate for that purpose.

Then it was argued that anything made subject to Income Tax must necessarily be income for all the purposes of the Act. Reference was made to the familiar passage in Lord Macnaghten's speech in *London County Council v. Attorney-General*⁽¹⁾, [1901] A.C. 26 (at page 35), beginning:

(¹) 4 T.C. 265, at p. 293.

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"Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else."

No doubt that was so in 1901; apart from Schedule A everything that was taxed at that date was income in the ordinary sense, and if a landowner, instead of drawing income from rent, occupied his own property, he was enjoying money's worth of an income character. But now Income Tax is sometimes meant to be a tax on something which is not income. For example, Section 318 charges Income Tax in certain circumstances on capital sums received for the sale of patent rights, and it does so by making such sums chargeable under Case VI of Schedule D.

I do not think that much can be inferred from any general statement equating sums charged to Income Tax with income. For some purposes it may be convenient and not incorrect to do this. Counsel for the Crown attached importance to the fact that Section 270 (6) (c) refers to

"income which is the subject of a balancing charge under this Chapter".

The context there is that certain allowances are to be available primarily against "the following income", and then there are specified income taxed under Schedule A and certain income taxed under Schedule D, Case VI. This appears to be the only place in the Act where the word "income" is used in connection with sums made subject to balancing charges. The word appears to me to be used here as mere description and to signify no more than that the sums in question are chargeable to Income Tax. But, even if the use of the word "income" in this rather unimportant Sub-section had some general significance, it would not go to the real point in this case. The question in this case is not whether a sum made subject to a balancing charge is income in some general sense but whether it is actual income within the meaning of Sections 245 and 255 (3). After a close examination of all the Sections relied on, in the light of the argument submitted for the Crown, I can find nothing sufficient to bring sums made subject to a balancing charge within the scope of the term "actual income" in Section 245.

My Lords, I fear I have taken up much time with technical argument. I have done so because Income Tax is a highly technical subject. But if I took a broader view of the case I should reach the same result. Under Section 245 it is the Commissioners' duty to determine whether the company has within a reasonable time distributed to its members a reasonable part of the income to which the Section applies. One would therefore expect the Section to apply to income which is in fact capable of distribution, and this expectation would be confirmed by the fact that the Section purports to deal with actual income. It is true that when one comes to Section 255 (3) one finds that by its terms actual income can include some items which, although they are income in the sense in which Lord Macnaghten used the word, are not money in the hands of the company capable of immediate distribution. But it is a long step from that to find that the Section also includes in actual income a new kind of subject which was not chargeable to Income Tax when the Section was first enacted and which is not income in any ordinary sense of the word. Of course, if Parliament has made it clear that the Section is to apply, then the Section must be applied, though it is not easy to see how the Commissioners, acting reasonably as they must, could take such a sum into account in carrying out their duty under the Section to consider whether a reasonable part has been distributed. This novel kind of "income" has been made chargeable to Income Tax, no doubt for good reasons; but I would

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not think that that fact raises any presumption that Section 245 also applies to it. Regarding the whole matter in this way, far from finding any clear indication of an intention to bring these sums within the scope of Section 245, I would not find it possible to reach that result without devious and dubious argument.

I am, therefore, of opinion that this appeal should be dismissed.

Lord Keith of Avonholm.—My Lords, we are concerned here with a direction and apportionment made by the Special Commissioners under Sections 245 and 248 of the Income Tax Act, 1952, with reference to undistributed income of the Respondent Company, which went into voluntary liquidation on 16th April, 1952. Much discussion has centred on the meaning of "actual income" in these Sections. In my opinion, "actual" here has a temporal significance and relates to income from all sources for the year or period to which the direction relates, and not to income computed by reference to any other year or period. This, I think, is clear from the language of Section 255 (3) of the Act. The accounts of the Company since 29th April, 1950, had not been certified by the Company's auditors prior to the liquidation, and it is common ground that the relevant period under consideration is 29th April, 1950, to 16th April, 1952, by reason of the terms of Section 253 of the Act. Under that Section the income of the Company for that period is, for the purposes of Section 245, deemed to be income available for distribution to the members of the Company.

The short question in the case is whether money received by the Company from the sales of certain plant and machinery in excess of the written-down value from allowances previously given for purposes of tax is income of the Company for the relevant period within the meaning of Sections 245 and 253 of the Act. The Company sold its business and ceased trading on 28th April, 1951. The plant and machinery were sold on the cessation of its business. It is common ground that in respect of this sale a balancing charge falls to be made on the sum of £18,675 under the provisions of Sections 292, 301 and 323 of the Act of 1952. The year of assessment for the balancing charge is fixed by reference to the Company's "basis period" for which the event occurred, in this case, 6th April to 28th April, 1951.

My Lords, it would seem that the income of the Company from all sources means income of the Company from any source brought into charge for Income Tax under the Act of 1952. The only source suggested in the present case is the trade of the Company, the profits or gains of which are brought into charge under Schedule D. The Crown says that the subject-matter of the balancing charge, namely, £18,675, is such a profit or gain. The Respondent Company say it is not. This sum represents excess allowances that have been given to the Company in previous years under the provisions of the Act of 1952, or previous Acts, including the Income Tax Act, 1918, making to traders allowances in respect of the capital cost of machinery and plant and which were given as deductions from profits or gains brought into charge for tax. Under the Act of 1918 no provision was made for recoupment to the Revenue if it should ultimately be found, on sale of an asset or otherwise, that an excessive allowance had been made, whereas under the present Act provision is made for such a case, in the shape of a balancing charge, and also, where it is found that too small an allowance has been given to the trader in past years, for giving him further relief in the shape of a balancing allowance. Section 292 of the Act is the Section that provides the measure for computing the amount of the balancing allowance or the amount on which a balancing

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charge falls to be made. The Section has been previously considered in this House and elsewhere, and I find it unnecessary to examine its provisions in further detail. It is agreed that the sum subject to the balancing charge, namely, £18,675, has been correctly computed. I would refer, however, to what have been called the relevant charging provisions of the Act, though they might more appropriately be called the relieving and charging provisions. Section 301 says:

"(1) Any allowance or charge made to or on any person under the preceding provisions of this Chapter shall . . . be made to or on that person in charging the profits or gains of his trade."

Section 323 provides:

"(1) Any claim by a person for an allowance falling to be made to him under any of the provisions of this Part of this Act in charging the profits or gains of his trade shall be included in the annual statement required to be delivered under this Act of the profits or gains thereof, and the allowance shall be made as a deduction in charging those profits or gains."

Sub-section (2) provides for carrying forward the allowance or part thereof to succeeding years where the profits or gains of a year are insufficient to permit full effect being given to the deduction. Sub-section (4) reads:

"Any charge falling to be made under any of the provisions of this Part of this Act on a person for any year of assessment in charging the profits or gains of his trade shall be made by means of an assessment on the profits or gains of that trade for that year of assessment in addition to any other assessment falling to be made thereon for that year."

I pause at this point to ask what is there that fixes the rate at which the balancing charge falls to be made on the profits or gains of the trade? There is nothing in the Act that fixes the rate expressly. It is, however, common ground that the rate is the standard rate of Income Tax for the basis period. I see no way of bringing in that rate except through Section 1 of the Income Tax Act, 1952, which applies the rate of Income Tax fixed by any Act for any year to all property, profits or gains of that year comprised in the Schedules of the Act of 1952. It is hardly necessary to refer to repeated observations in this House and elsewhere that Income Tax is a tax on income; and if a balancing charge is to be regarded as a tax on income, it is a short step to take to regard the amount on which it is levied as income arising, in the present case, from a transaction in the course of trade. If it is not income within one or other of the Schedules of the Act, I can see no authority for levying any rate of Income Tax on the amount computed as subject to a balancing charge. It is said that a change has taken place in the outlook of Income Tax legislation and that all receipts which are subject to tax are not necessarily income receipts. It is true that a somewhat exceptional course seems to have taken place under Section 318 of the Act in the case of the sale of patent rights for a capital sum. But a particular exception in the case of so special a matter as the sale of patent rights does not, in my opinion, detract from the general principle to which I have referred.

The scheme generally of the relevant statutory provisions seems to me to be to allow to be charged against the revenue side of a trading account depreciation in respect of wear and tear of capital assets, and on the sale or otherwise of these assets either to restore to revenue what has been found to have been unnecessarily charged for depreciation, or to allow a further charge against revenue if it is found that insufficient depreciation has been allowed. I should not have thought that this would be contrary

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to sound commercial and accountancy principles, but, whatever may be commercial or accountancy practice, I think the object of the Act was to secure that the subject-matter of the balancing charge should be treated as an income profit subject to tax and not as a capital profit free from tax. If this be so, then the sum of £18,675 should properly be regarded as a receipt credited to revenue, though arising out of a capital transaction, and as it would go to increase the profits and gains of the trade and arise out of the trade it should form part of the income of the Company for the purposes of Section 245.

The weight of the argument for saying that this sum is not such income seems to rest on the language of Section 323 (4), which levies the balancing charge by an assessment on profits or gains additional to any other assessment on the profits or gains. Any other assessment would include Income Tax under Schedule D. Therefore, so the argument would seem to run, this sum cannot be income from any source recognised as giving rise to a liability to Income Tax under the Act. This I find difficult. The more natural meaning, in my opinion, is that this is a supplementary assessment of the same nature and origin as the tax levied under Schedule D, and imposed because the subject-matter of the charge is regarded as an addition to the profits or gains of the trade. Thus we find a reason, difficult otherwise to explain, for fixing the rate of charge at the appropriate Income Tax rate for the basis period. Moreover, the balancing charge cannot be considered without reference to its correlative, the balancing allowance. The balancing allowance has the effect of reducing the amount of profits or gains brought into charge for tax. Is it to be said that the income of a company for the purposes of Section 245 is the profits or gains before deduction of the balancing allowance? I think not. But the balancing allowance proceeds from the same kind of transaction as may give rise to a balancing charge. The considerations, in my opinion, are the same in each case. The balancing allowance results in a reduced assessment. In the case of a balancing charge an extra assessment is made, and the result is the same as if a single assessment was made on the sum of the profits or gains plus the amount brought in as subject to a balancing charge. What has been allowed unnecessarily as a deduction from profits or gains for the purposes of tax is to be subject to the same kind of tax when brought back into account. In my opinion, the sum here in question is just an additional profit or gain of the Company subject to tax under Schedule D of the Act.

I derive little assistance from various other Sections of the Act which were referred to in the course of the hearing, and find in them nothing to militate against the view I have expressed. Some reliance was placed by the Respondent on Section 337 of the Act, inasmuch as it expressly provides that certain proceeds from the sale of an asset representing scientific research expenditure of a capital nature shall be treated as a trading receipt of the trade. This argument I find somewhat double-edged. In any event, the Section finds place in a separate Part of the Act, Part XI, devoted to "Relief for Expenditure on Scientific Research", and I should hesitate to draw any inference from Part XI in considering the effect of Part X of the Act. Of greater significance, in my opinion, is the reference in Section 270 (6) (c) to

"income which is the subject of a balancing charge under this Chapter", which appears in the same Part of the Act as that covering allowances in respect of machinery and plant. Section 270 appears in Chapter I of

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Part X of the Act, but Chapters I, II and III of Part X are all modelled on the same pattern and bring in balancing allowances and balancing charges which in principle differ in no material respect in any one of these Chapters. The separation into Chapters is due to the different nature of the assets dealt with, and leads to the same results in each case.

Lastly, it may be noted that, where an individual trader has been assessed to tax at the standard rate for any year of assessment, the assessment will be final and conclusive, under Section 524 (4) of the Act, in estimating his total income. This would seem to be conclusive as to his Surtax liability. It would be at least strange that where an individual's Surtax liability emerged through his interest as a shareholder in a trading company under the Surtax provisions of Part IX of the Act a different result should be reached.

On all considerations I am of opinion that the determination of the Commissioners is wrong and that the appeal should be allowed.

Lord Somervell of Harrow.—My Lords, I agree with the opinions of my noble and learned friends Lord Morton of Henryton and Lord Reid. I would dismiss the appeal.

Questions put :

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and the appeal dismissed and that the Appellants do pay to the Respondents their costs in this House as between solicitor and client.

The Contents have it.

[Solicitors :—Solicitor of Inland Revenue ; Simmons & Simmons, for March, Pearson & Green, Manchester.]